No. 11126

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.

STATEMENT OF PLEADINGS AND FACTS.

Appellant, United States of America, is appealing from the final Decree of the United States District Court, Southern District of California, Central Division, entered March 16, 1945. The case is one in Admiralty and was tried before the Honorable Ben Harrison, Judge presiding. The statement of statutory provisions, pleadings and facts under Rule 20 follows.

A.

Statutory Provision Believed to Sustain the Jurisdictions.

The case was initiated, tried and handled throughout under the Suits in Admiralty Act 46 U. S. C. A. 741-752, which Act provides specifically for libels *in personam* against the United States in cases of this character. The libel itself made specific reference to the fact that it was filed under the provisions of the Suits In Admiralty Act (page 4). It is clear, therefore, that the District Court had jurisdiction.

This Court has jurisdiction upon appeal to review the final decree in question under the general appeal statute 28 U. S. C. A. 230, which applies to final decrees in Admiralty.

B.

Pleadings Necessary to Show the Existence of the Jurisdictions.

libel *in personam* was filed in the District Court in accordance with the Suits In Admiralty Act and the libel, Paragraph 5, makes specific reference to the Act. The libel appears at pages 3-6 of the record. In brief, the libel alleged the operation of the S. S. Egg Harbor as a merchant vessel by United States of America by and through War Shipping Administration, the making of an agreement for the carriage of petroleum products on the S. S. Egg Harbor with Standard Oil Company of California, the loading and carriage of the products from San Pedro and El Segundo, California to Point Wells, Washington, the commingling and contamination of a portion of the products and resultant damage claimed.

Amendment to Paragraph 9 of the libel was allowed by the Court and it appears at pages 22-23 of the record. An amendment to the libel to conform to proof was allowed by the Court, the amendment being designated as a new Paragraph 12 of the libel, and a new prayer was permitted, designated as Paragraph 4 of the prayer—these appear at page 42.

Appellant, United States of America, answered the libel admitting certain allegations and denying the substantial allegations of commingling and damage resulting. The answer also set up two affirmative defenses alleging that the carriage of goods in question was pursuant to Tanker Voyage Charter Party Form 104 of War Shipping Administration, whereby Standard Oil Company of California chartered the S. S. Egg Harbor for carriage of a cargo of gasoline and diesel oil; that paragraph 19 of the charter party was a defense to any commingling or contamination by reason of its provision excusing the Vessel "for any consequences arising out of shipping more than one grade of cargo." The second affirmative defense set up was under Paragraphs 7 and 20(a) of the charter party alleging that if the cargo was commingled or contaminated, it arose "without the actual fault or privity of the Owner" in a pumping operation within Paragraphs 7 and 20(a) of the charter. The answer appears at pages 7-13.

Respondent, Keystone Shipping Company was not served, did not appear, and the libel was dismissed as to it at the inception of the trial (pp. 21 and 69).

Findings of fact and conclusions of law are found on pages 43-50 and the final decree at pages 51-53.

Order allowing appeal to the United States Circuit Court of Appeals for the Ninth Circuit was entered by the

District Court well within the three months time permitted under the statute, the Order appearing at page 59, and Petition for Appeal at page 58. Assignment of Errors was filed at the same time, and appears at pages 59-62 of the record.

We believe that the jurisdiction of the District Court and of this Court on appeal is clearly evident from the recitation of the pleadings.

C.

Statement of Facts.

The facts are comparatively simple, and there is little dispute over them. The principal difficulty in the case has been the construction of the Voyage Charter Party Form 104 and law applicable to the questions involved.

In April, 1943, construction of the S. S. Egg Harbor, a Tanker, was completed at Portland, Oregon, for the appellant, United States of America. It was what is known as a Swan Island Tanker, with a capacity of 135,000 barrels in nine cargo tanks. The vessel sailed south on its maiden voyage in ballast, under command of Captain Lawrence C. Olsen, bound for San Pedro, California, there to load a cargo of gasoline or diesel oil for appellee, Standard Oil Company of California, pursuant to Tanker Voyage Charter Party Form 104 of appellant, dated April 14, 1943, for the full capacity of the Vessel.

60,933.31 barrels of merchantable diesel oil were loaded on the S. S. Egg Harbor at San Pedro on April 17, 1943, in tanks Nos. 5, 6, 7 and 8. On the following day, April 18, 1943, 63,789.52 barrels of merchantable gasoline were loaded at El Segundo in tanks Nos. 2, 3, 4 and 9. Tank No. 1 was not used.

The S. S. Egg Harbor then proceeded on her voyage north to Point Wells, Washington, this being located some fourteen miles north of Seattle. It arrived there during the early morning of April 23, 1943, in a howling gale, and it was some time before the Vessel could be docked and discharge of cargo started. At approximately 1:45 P. M. discharge of both diesel oil and gasoline commenced simultaneously, each of the products being pumped through a separate hose to a pipe connection called a "header" or "riser" on appellee's dock, and from there through a separate pipe into appellee's shore tanks. Appellee had sole control of the handling and distribution of the cargo on shore as soon as it left the ship's side.

Bottle samples were taken by appellee from the vessel's tanks before pumping commenced, and showed clear. Pumping was then commenced and appellee took samples immediately of both diesel and gasoline at the risers on its dock, and the samples were in order and clear. Appellee continued to take samples about every hour until approximately 4:15 or 4:30 P. M., when a sample taken showed that the gasoline was badly off color, whereupon the vessel was notified and pumping stopped immediately. This was the first indication of contamination. Investigation was made on the Egg Harbor by representatives of appellant and then discharge of both products was resumed about two hours later. This continued for about 15 minutes and then discharge of both products was again stopped. At approximately 9:30 P. M. on April 23, discharge of diesel alone was made, and this continued for 20½ hours until approximately 6:00 P. M. on April 24. Gasoline was then discharged alone, and was completed at approximately 5:00 A. M. on April 25, 1943.

The diesel was first run into shore tank 8 by appellee and then diverted into tank 41, about 6:00 A. M. on April 24. The gasoline was first put into shore tank 62 by appellee, and then when the gasoline showed clear coming over the ship's side, the clear gasoline was diverted by appellee to shore tank 61. No claim is made by appellee concerning the products pumped into shore tanks 41 (diesel) and 61 (gasoline), since the products ran into these tanks were uncontaminated.

When discharge of both products was originally commenced at 1:45 P. M. on April 23, there were 2,376 barrels of merchantable diesel oil in shore tank 8, and 11,339 barrels of merchantable gasoline in shore tank 62. 23,131 barrels of allegedly contaminated diesel were run into shore tank 8 with the 2,376 barrels of merchantable diesel already there. 8,140 barrels of contaminated gasoline were run by appellee into its shore tank 62 containing 11,339 barrels of merchantable gasoline. Thus the entire contents of the respective tanks became contaminated.

The District Court concluded that the Carriage of Goods by Sea Act (46 U. S. C. A. 1300-1315) applied to the shipment involved under Paragraph 25 of the charter, and awarded damages for the entire contents of shore tanks 8 (diesel) and 62 (gasoline). The Court's opinion appears at pages 27-41 of the record and also in 59 F. Supp. 100.

The Tanker Voyage Charter Party Form 104 and its provisions are an important part of this case, and likewise the two bills of lading issued in connection therewith.

Unfortunately, they are not very legible as they appear at pages 17, 18, 19 and 20 of the record, and in order to facilitate the work of the Court, appellant is taking the liberty of printing them in full as an Appendix attached hereto. Appellant is also forwarding to the Court four photostatic copies of each, so that the Court will have the physical appearance of the Voyage Charter Party and the bills of lading before it. However, these photostatic copies were in turn made from a photostatic copy and are not too legible, and consequently, appellant believes it will save the time of the Court to have the Appendix attached.

II.

STATEMENT OF THE CASE.

Succinctly stated, the questions involved in this appeal are as follows:

(1) Does the Carriage of Goods by Sea Act apply to eliminate the defenses raised, particularly Paragraph 19 of the Voyage Charter, excusing the Vessel "for any consequences arising out of shipping more than one grade of cargo"?

(2) Is appellee entitled to recover for damages to the diesel oil and gasoline in shore tanks 8 and 62 before discharge commenced, if liability be established?

(3) Is appellee entitled to attorneys' fees as damages, and if so, is the sum of $8,000.00 awarded reasonable, if liability be established?

The first question is raised because appellant has contended throughout that the Carriage of Goods by Sea Act does not apply to the shipment involved. It has been appellant's position throughout that a private contract of carriage is involved, so that the parties can contract in any manner they wish; that the Charter Party is the contract; that the Carriage of Goods by Sea Act does not apply; that any contamination arose as a "consequence arising out of shipping more than one grade of cargo" and consequently there is no liability on appellant.

The second question is raised for the reason that appellee had sole control and handling of the diesel oil and gasoline after it left the ship's side and appellant has contended throughout that if entitled to recover, appellee is not entitled to recover for damages to the merchantable products already in the shore tanks before discharge commenced. The difference involved is $16,243.56.

The third question is raised because the District Court concluded that appellee was entitled to recover attorney's fees as damages, and awarded the sum of $8,000.00 as a reasonable attorney's fee. The item of attorneys' fees as damages was injected in the case for the first time during the second day of trial, and appellant contends that attorneys' fees are not proper as an item of damages in a case of this type, but that if proper, the sum of $8,000.00 was excessive and unreasonable.

III.

ASSIGNMENT OF ERRORS RELIED UPON.

Appellant has assigned 19 errors [pp. 59-62] and relies upon them all except Nos. 2 and 15. These two latter errors refer to the authority and power of the War Shipping Administration to enter into and execute the Voyage Charter of April 14, 1943 on behalf of the appellee, United States of America, and will not be raised or argued by appellee in this appeal.

The assignments of error fall broadly into three categories. Nos. 1 [p. 59] 3, 4, 5, 6 [p. 60], and 14 [p. 61], are concerned with the first question involved, *i. e.,* applicability of the Carriage of Goods by Sea Act.

Nos. 7, 8 [p. 60], 9, 10, 11, 12 and 13 [p. 61], have to do with the second question involved, namely, the correct rule and measure of damages.

Nos. 16, 17, 18, and 19 [p. 62], are concerned with the third question involved, *i. e.,* the right to attorneys' fees as damages, and if so, the reasonableness of the award made.

IV.

ARGUMENT OF THE CASE.

A.

The Carriage of Goods by Sea Act Does Not Apply.

Errors 1 (p. 59), 3 and 4 (p. 60) are applicable here and are as follows:

1. The District Court erred in rendering a decree for libelant in any particular, in any sum, or at all.

3. The District Court erred in holding that the Carriage of Goods by Sea Act was by the charter and bills of lading made applicable to the carriage of diesel furnace oil and gasoline in question.

4. The District Court erred in holding that Paragraph 25 of the charter prevailed over other paragraphs and terms of the charter, modifying Paragraph 25 or conflicting therewith.

Before discussing the points of law involved it is important to have in mind the pertinent provisions of the contract of carriage.

The Egg Harbor was chartered by appellee for a single voyage under Form 104 of appellant acting by and through War Shipping Administration. Form 104 is designated as "Tanker Voyage Charter Party" and in this connection was dated April 14, 1943. It appears at pages 17 and 18 of the record in rather illegible form and is printed in full in the appendix.

When the diesel oil was loaded at San Pedro, Captain Olsen signed the bill of lading dated April 17, 1943 [p.

19] which had been prepared by the Standard Oil people [p. 241]. The bill of lading dated April 18, 1943 for the gasoline [p. 20] was signed by Captain Olsen, it having been likewise prepared by the Standard Oil people [p. 242].

The charter party and bills of lading are the documents which were executed and issued in connection with the cargo involved [p. 14].

Paragraph 25 of the charter party is heavily relied upon by appellee as making the Carriage of Goods by Sea Act applicable to the shipment. It reads verbatim as follows:

> "25. Clause Paramount.—All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further."

Each of the bills of lading signed by Captain Olsen contains this clause rubber-stamped on the face:

> "This bill of lading shall have effect subject to the provisions of the carriage of goods by Sea Act of the United States, Approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its Rights or Immunities or an increase of any of its responsibilities or liabilities

under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

Paragraph 24 of the charter also comes into play under appellant's view of the case and reads as follows:

"24. BILL OF LADING.—Bills of Lading, in the form appearing below, for cargo shipped shall be signed by the Master as requested. Any Bill of Lading signed by the Master or Agent of the Owner shall be without prejudice to the terms, conditions and exceptions of this Charter. The Charterer hereby agrees to indemnify and hold harmless the Owner, the Master, and the Vessel from all consequences or liabilities that may arise from the Charterer or its agents, or the Master, signing bills of lading or other documents inconsistent with this Charter, or from any irregularity in papers supplied by the Charterer or its agents, or from complying with its or its agents' orders."

(1) The Carriage of Goods by Sea Act Did Not Apply Unless by Agreements of the Parties.

Section 1312 of the Carriage of Goods by Sea Act (46 U. S. C. A. 1300-1315) provides in part as follows:

"This chapter and Section 25 of Title 49 shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade . . . Nothing in this chapter and Section 25 of Title 49 shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions and any other port of the United States or its possessions;".

It is clear, therefore, that in the absence of anything further the act would not apply to the case at bar.

However, the same Section 1312 contains a proviso as follows:

> "Provided, however, that any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter and Section 25 of Title 49, shall be subject hereto as fully as if subject hereto by the express provisions of this chapter and Section 25 of Title 49:".

It follows that in situations covered by the proviso the parties may incorporate the act in the contract by an express statement to that effect.

Since the voyage in question was between ports of the United States, the case is one where without anything more, the act would not apply.

(2) The Charter Party Was a Contract for Private Carriage and the Parties Were Free to Contract as They Chose.

It is the settled rule in the United States that a vessel operating under a charter party for the full capacity of the vessel as in this case is a *private* carrier and consequently the Harter Act (46 U. S. C. A. 190-195) does not apply, the parties being free to contract as they choose, the same as in any other private contract or charter. In such instance bills of lading issued are in the nature of receipts only, the charter determining the rights of the respective parties.

The leading and most frequently cited authority is *The G. R. Crowe*, 294 Fed. 506 (2 C. C. A. 1924). Suit was brought to recover for loss of gas oil shipped in bulk, the vessel operating under a voyage charter party for its full

capacity as here. There was a considerable shortage of oil upon delivery by reason of leakage and the Court in its opinion assumed that the vessel was unseaworthy, the large leakage being due to defective oil tanks. *In the charter party* was a provision among others providing that "The steamer is not to be accountable for leakage" and the vessel's owner relied on this clause. Bills of lading were also signed by the master and contained the provision that "this shipment is subject to all terms and provisions of . . . the act of Congress . . . approved on the 13th day of February, 1893."

The shipper relied on the clause in the bill of lading which obviously was at variance with the terms of the charter party.

The Court observed that "The Harter Act was not incorporated in the charter party" [p. 508] and then went on to say later on the same page:

> "The suit at bar, however, was not brought upon the bill of lading; but a suit thus brought would not have helped libelant, because, where a bill of lading is issued by the master to a charterer, who has contracted for the full capacity of the ship, such bill of lading is merely a receipt, and not a contract, and, in any event, in such circumstances, the master would not have authority to change or modify the charter by a bill of lading. The Fri, 154 Fed. 333, 83 C. C. A. 205.
>
> "In sections 1 and 2, *supra*, it will be noted that the reference is solely to 'any bill of lading or shipping document' *and a charter is neither*. These sections manifestly refer to common carriers, and were enacted to prevent owners of vessels from imposing self-exculpatory terms which were unjust to shippers." (Emphasis ours.)

In *The Fri*, 154 Fed. 333 (2 C. C. A. 1907) a libel was filed to recover the value of some cattle shipped from Columbia to Cuba, the cattle being lost by reason of stranding. The cattle were shipped pursuant to a charter party which had been customarily signed by the parties and which contained a stipulation exempting the vessel and her owners from liability for errors of navigation "occasioned by negligence, default, or error of judgment of the pilot, master or mariner." The master also delivered a bill of lading to libelants and it provided among other things that the shipment should be "subject to all the terms and provisions of, and all the exemptions from, liability contained in the act of Congress of the United States approved on the 13th day of February, 1893 . . . meaning the act known as the Harter Act." The Court held that the stipulation in the charter party was valid and had the following to say at page 338:

> "In this case, however, a common carrier was not a party to the contract. When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire. Hutchinson, Carriers (2d Ed.) 73. See, also, Sumner v. Caswell (D. C.), 20 Fed. 249, and the authorities there referred to. It has not yet been decided by any court that a condition in such a contract, to which the Harter act has no application, relieving a shipowner from liability on account of the carelessness of its employes, is contrary to public policy.
>
> "The decisions which deny the validity of such stipulations proceed upon the ground that the carrier is exercising a public employment, and cannot by such stipulations relax his obligations to the public. Private carriers are not subject to the exceptional or

> extraordinary duties and liabilities of common carriers, and they may carry for whom they choose, and for such compensation and upon such conditions of liability as may be agreed upon. The contracting parties stand upon equal terms, and can make such a contract as they think reasonable."

The court is doubtless aware of the fact that the Harter Act was supplanted and supplemented by the Carriage of Goods by Sea Act in 1936. The Courts have frequently turned to decisions under the Harter Act in construing the Carriage of Goods by Sea Act. Thus in *Spencer Kellogg & Sons v. Great Lakes Transit Corporation,* 32 F. Supp. 520 (D. C. Mich. 1940), the Court said at page 530:

> "I hold that the Congress intended these words (i. e., 'in the navigation or in the management of the ship') as used in the Carriage of Goods by Sea Act, 1936, to have the same meaning as they assigned to them in the long line of decisions construing these words as used in the Harter Act."

A fairly recent case citing *The G. R. Crowe* and *The Fri* with approval as well as several other cases is *The Westmoreland,* 86 F. (2d) 96 (2 C. C. A. 1936), which involved a voyage charter to transport a cargo of sulphate of ammonia. The Court said at page 97:

> "The Charter, being for the whole barge, made her a private carrier and left the parties free to contract as they chose. The Fri, 154 F. 333 (C. C. A. 2); The G. R. Crowe, 294 Fed. 506 (C. C. A. 2); The Elizabeth Edwards, 27 F. (2d) 747 (C. C. A. 2); The Nat Sutton, 62 F. (2d) 787, 789 (C. C. A. 2)."

Knauth in his text, The American Law of Ocean Bills of Lading, 1941 Revised Edition, states the rule thus at page 131:

> "In interpreting the Harter Act, the American courts developed a line of cases, of which The G. R. Crowe is the most commonly cited example (1924 A. M. C. 5, 294 Fed. 506, 6 Dor. 344 (2 C. C. A. 3) certiorari denied, 264 U. S. 586) that carriage of an entire shipload for a single shipper is 'private' carriage and not common carriage, and hence not covered by the Harter act."

(3) The "Bills of Lading" Signed by the Master Were Receipts Only and No Part of the Contract of Carriage.

Perhaps the best discussion of this rule and one of the leading authorities for it is *The Fri,* 154 Fed. 333 (2 C. C. A. 1907), where the Court said at page 337:

> "The rule is that where there is a charter party *the bill of lading operates as the receipt for the goods* and as a document of title passing the property of the goods, *but not as varying the contract* between the charterer and the shipowner. Wagstaf v. Anderson, 5 C. P. Div. 171, 177; Rodocanachi Sons & Co. v. Milburn Bros., 6 Asp. 100, 103; Sewell v. Burdick, 10 App. Cas.: 74, 105; The Chadwick (D. C.), 29 Fed. 521." (Emphasis ours.)

The rule was reiterated in *The G. R. Crowe,* 294 Fed. 506 (2 C. C. A. 1923), where the Court said at page 508:

> "The suit at bar, however, was not brought upon the bill of lading; but a suit thus brought would not have helped libelant, because, where a bill of lading is issued by the master to a charterer, who has contracted for the full capacity of the ship, such bill of lading is merely a receipt, and not a contract, and, in

any event, in such circumstances, the master would not have authority to change or modify the charter by a bill of lading. The Fri, 154 Fed. 333, 83 C. C. A. 205."

In other words, the situation presented in a voyage charter party as here is that the master of the vessel gives to the shipper a document usually called a "bill of lading" but which is in reality simply a receipt for the goods. It is something to show that the shipper has so much goods—in this case diesel oil and gasoline—on board. It is in no sense the contract of carriage between the original parties, *i. e.,* ship and shipper. *The contract is the charter party.*

(4) The Carriage of Goods by Sea Act Was Never Incorporated in the Charter Party and Consequently Does Not Apply to the Shipment in Question.

This may seem a brash statement on first encounter but a careful reading of the pertinent provisions of the *charter party*—which is *the only contract of carriage between the original parties*—bears out the contention one hundred per cent. It should be noted that this case *involves only the original parties* in the deal, the United States and Standard Oil, ship and shipper if you please. There are no third parties involved whatever and no rights of third parties or intervenors to be considered.

Paragraph 25 only talks about bills of lading. It says nothing whatever about the Carriage of Goods by Sea Act being incorporated *in the charter party.* Let us examine it basically, the emphasis being ours:

"25. CLAUSE PARAMOUNT.—*All Bills of Lading issued hereunder* shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the

United States, approved April 16, 1936, which shall be deemed to be incorporated *therein,* and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further."

Where is any language or discussion *making the charter party* subject to the provisions of the Act? There isn't any. It is plain that the Act is in no way incorporated into or made a part of the *charter party itself.*

Paragraph 24 must be read in conjunction with Paragraph 25 and we quote Paragraph 24 again, the emphasis being ours:

"24. Bills of Lading.—Bills of Lading, in the form appearing below, for cargo shipped shall be signed by the Master as requested. Any Bill of Lading signed by the Maker or Agent of the Owner *shall be without prejudice to the terms, conditions and exceptions of this Charter.* The Charterer hereby agrees to indemnify and hold harmless the Owner, the Master, and the Vessel from all consequences or liabilities that may arise from the Charterer or its agents, or the Master, signing bills of lading or other documents inconsistent with this Charter, or from any irregularity in papers supplied by the Charterer or its agents, or from complying with its or its agents' orders."

It is obvious that the "bills of lading" referred to in Paragraph 24 of the charter party were simply receipt forms "for cargo shipped" in the form appearing at the

end of the charter party. In this connection it is to be remembered that Captain Olsen testified that the bills of lading *were prepared* by Standard Oil and he signed them after the cargo had been loaded (pages 241-242).

Where there are opposite provisions in a voyage charter party and a "bill of lading" as in the case at bar, the contract of carriage being a private one as here, *the charter party prevails.* That is founded on the basic proposition that the *charter party is the contract of carriage* and the bill of lading is a mere receipt. The *G. R. Crowe, supra,* is excellent authority on the point—the Harter Act was not incorporated in the charter party but the bill of lading did incorporate it and the Court held that the Harter Act was no part of the contract. The same situation prevailed in *The Fri, supra.* There are a number of other cases along a slightly different line which support appellant's position, although a casual reading might give the impression that they hold otherwise. We refer to such cases as *The Framlington Court,* 69 F. (2d) 300 (5 C. C. A. 1934) which involved a voyage charter for the carriage of news print paper. The charter was for full capacity and hence amounted to a private contract of carriage. *The charter itself* contained this language:

> "It is mutually agreed that this contract is subject to all the terms and provisions of . . . an act relating to navigation of vessels, etc."

In other words, the very charter party itself expressly incorporated the Harter Act which is far different from the situation here where Form 104 mentions and refers to bills of lading only in Paragraph 25.

To the same effect are *The Agwimoon,* 24 F. (2d) 864 (D. C. Maryland 1928); *Warner Sugar Refining Co. v. Munson S. S. Line,* 23 F. (2d) 194 (D. C. New York 1927), affirmed without opinion in 32 F. (2d) 1020; and *The Ferncliff,* 22 F. Supp. 728 (D. C. Maryland 1938) affirmed without opinion in 105 F. (2d) 1021. In all these cases the Harter Act was expressly incorporated into the charter itself. In the case at bar there is nothing of the kind.

Why then, it may be asked, is Paragraph 25 in the charter at all? This is a fair question. If the terms of the bill of lading in a case of this type conflict with the charter party, the charter party controls as we have seen in cases like the *G. R. Crowe, supra.* However, in the case at bar we believe that Paragraph 25 was inserted *for the protection of third persons.* If Standard Oil transfered the bills of lading for value to third persons who were strangers to the charter party, then the bills of lading would take on a new significance as to third persons. They would no longer be simply receipts—as between the original parties—but rather an undertaking on the part of the vessel and its owner with the holders. The following language from *The Fri,* 154 Fed. 333 (2 C. C. A. 1907) at pages 336-337, is right in point:

> "The usual practice is for the master, or agent of the shipowner, to give bills of lading for the cargo although it may be shipped under a charter party. When the charterer himself ships the goods these bills of lading operate as receipts for them, and also as documents of title which he can negotiate, and thereby constructively transfer possession of the goods. But they do not, as between the shipowner and the charterer, operate as new contracts, or as modifying the contract in the charter party. *Where the bill*

> *of lading has been transferred for value to third persons who are strangers to the charter party, its terms become very important. It then constitutes an undertaking on the part of the shipowner with the holders, which is independent of the charter party,* except so far as that is expressly incorporated in it. Carver, Carriage by Sea, 151, 152. It constitutes the contract between the parties where there is no charter party, but where there is a charter party it never supersedes any unequivocal provisions therein. This has long been settled by the adjudications." (Emphasis ours.)

There is nothing strained or tricky in the terms of the charter party as urged by appellant. It is clear that the Carriage of Goods by Sea Act is not incorporated therein and *is not applicable to any shipment as between the original parties.* Paragraph 25 and the rubber stamped provision on the "bills of lading" come into play only for the benefit of third persons.

B.

There Is No Liability for Any Contamination Under the Charter Party.

Errors 5 and 6 (page 60), are involved and read as follows:

> 5. The District Court erred in holding that respondent's first affirmative defense, based upon Paragraph 19 of the charter, was not applicable and did not constitute a defense to the libel.
>
> 6. The District Court erred in holding that respondent's second affirmative defense, based upon Paragraphs 7 and 20(a) of the charter, was not applicable and did not constitute a defense to the libel.

Paragraph 19 of the charter party reads as follows:

> "19. Cleaning—If requested by the Charterer, the Vessel will steam the tanks, pipes and pumps of the Vessel or Butterworth en route to loading port and there pump water ballast and/or slops into shore tank or barge to be supplied by Charterer immediately on arrival. Any delay in furnishing these facilities shall count as used lay time. Any further cleaning, if required, shall be done by and at the expense of Charterer and time consumed shall count as used lay time. If Charterer does not require additional cleaning at port of loading Owner shall not be responsible for any damage caused to or contamination of cargo, by reason of failure to have the tanks properly cleaned for receiving the shipment. Except as may otherwise be indicated in Part I, the Vessel shall not be responsible for leakage, shrinkage, difference between reported intake and reported outturn, deterioration, discoloration, or change in quality of the cargo, *nor for any consequences arising out of shipping more than one grade of cargo.*" (Emphasis ours.)

This was set up as a special defense by appellant in its answer (pp. 9 and 10), and urged by appellant at the time of trial.

The trial Court recognized that this would be a full defense if the Carriage of Goods by Sea Act did not applying, Judge Harrison stating in the opinion, as follows (pp. 28-29):

> "The first question to be determined is whether the Carriage of Goods by Sea Act covers the shipment of oil involved. The libelant contends that it does, while the respondent holds to the contrary, because the vessel was operating under a charter for the full

capacity of the vessel and therefore respondent was free to contract as a private party. Under this reasoning the parties were in the relationship of a bailor and bailee. Respondent then refers to paragraph 19 of the charter party which provides:

'Except as may otherwise be indicated in Part I, the vessel shall not be responsible for . . . any consequences arising out of shipping more than one grade of cargo.'

"It naturally follows that if the Carriage of Goods by Sea Act does not apply, the libel must be dismissed because of the above provision."

Appellant respectfully contends that any contamination in the discharge of the cargo from the Egg Harbor was a "consequence arising out of shipping more than one grade of cargo" and consequently, there is no liability on the part of appellant under the plain terms of the contract of carriage. We have found no precise cases on the subject although a similar provision was contained in the charter party in *The G. R. Crowe, supra.* In that case, Article 16 of the charter party read as follows:

"The Captain is bound to clean the tanks, pipes, and pumps of the steamer to the satisfaction of the Charterer's inspector. *The steamer is not to be responsible for any consequences arising through Charterer's shipping different kinds of oil.* The steamer is not to be accountable for leakage." (Appearing at page 507 of 294 Federal—Emphasis ours.)

It will be recalled that in *The G. R. Crowe*, leakage was involved and the provision, "The steamer is not to be accountable for leakage" excused the vessel and its owner.

If contamination had occurred, it is reasonable to assume that the Court would have excused the vessel and its owner by reason of the provision, "The steamer is not to be responsible for any consequences arising through Charter's shipping different kinds of oil."

The terms of Paragraph 19 are reasonable in the light of all the circumstances. The United States was engulfed in "do or die" World War II. Oil and gasoline were the things that made airplanes, tanks, ships and all the mechanisms of war run. Oil and gasoline were a prime double-plus necessity. Old tankers and new tankers were working with tremendous dispatch, often with green crews. It is well known that 140,000-barrel tankers were, in the language of the trade, "making a full turn-around" in thirty-six hours, whereas the normal time runs usually six or seven days. The emphasis was on speed and getting things done.

In the case at bar, the Government was transporting petroleum products during war-time under a private contract of carriage for Standard Oil, and it was an entirely reasonable and proper thing, under all the attendant circumstances, for the charter party to contain the provision exempting the vessel from "any consequences arising out of shipping more than one grade of cargo." It is interesting, likewise, to note that *The G. R. Crowe, supra*, arose during World War I, and a similar provision was in the charter party in that case as above noted. In peace time the rigors of competition would probably serve to automatically eliminate such provision in a contract of carriage.

C.

Damages Should Not Include Diesel Oil and Gasoline Already in Shore Tanks 8 and 62, if Appellee Is Entitled to Recover.

(1) Appellant Should Not Be Chargeable With Appellee's Activities on Shore.

Errors 7, 8 (p. 60), 9, 10, 12 and 13 (p. 61), are applicable here as follows:

> 7. The District Court erred in applying the incorrect rule and measure of damages.
>
> 8. The District Court erred in holding that libelant was entitled to the full amount of damages pertaining to the diesel furnace oil and gasoline in the sum of $49,158.12.
>
> 9. The District Court erred in not holding that, if entitled to damages, libelant was not entitled to damages on account of the diesel furnace oil and gasoline which became contaminated in libelant's shore storage tanks when contaminated products from the vessel were added thereto, such damages being in the sum of $16,243.56.
>
> 10. The District Court erred in finding that respondent at the time the charter was made should reasonably have understood or contemplated that the cargo would be received by libelant from the "Egg Harbor" into storage tanks already partly full.
>
> 12. The District Court erred in not finding that no diesel furnace oil was contaminated by respondent.
>
> 13. The District Court erred in finding that the contents of libelant's shore tanks in question were uncontaminated before discharge from the S. S. "Egg Harbor" commenced.

The testimony of Mr. Fred R. Kilbourn [pp. 70-143], Plant Superintendent of appellee's Point Wells plant, tells the story of appellee's activities and what transpired on shore. A brief review of his testimony is necessary as a background for this phase of appellant's argument.

The headers on the dock were equipped to take samples as the fluid passed through the headers from the vessel into the shore pipes [p. 74]. Discharge of *gasoline* from the Egg Harbor commenced about 1:45 P. M. on April 23, 1943, and discharge of *diesel* commenced about three-quarters of an hour, or an hour later [p. 78]. At the time discharge commenced, there were 2,376 barrels of diesel oil in shore tank 8, and 11,339 barrels of gasoline in shore tank 62 [p. 79]. Diesel oil went into shore tank 8, and gasoline into shore tank 62. Samples were taken by Standard Oil employees from the headers when discharge commenced, and the gauger took these samples hourly [p. 80]. The first sign of anything unusual was around 4:15 or 4:30 P. M., when the gauger reported that the gasoline was badly off color [p. 80]. Pumping was stopped immediately, the vessel notified, and the vessel's representatives, Messrs. Hicks and Stevens, came from Seattle and checked on board the vessel [p. 81]. Pumping was resumed of both products simultaneously about two hours later [p. 83], but then stopped in about 15 minutes, because the gasoline was still off color [p. 84]. Pumping of diesel oil alone was then commenced, about 9:30 P.M., and continued into shore tank 8 until 6 A.M., on April 24, when it was diverted by appellee into shore tank 41. Pumping continued into shore tank 41 until approximately 6 P. M., when discharge of the diesel was completed [pp. 84 and 85].

Pumping of gasoline alone was then commenced, about 8 P. M. on April 24, and finished some 9 hours later, approximately 5 A. M. on April 25 [p. 98].

The diesel appeared to be in good order, as far as Mr. Kilbourn and others could tell [p. 85]. Samples were taken of the vessel's tanks on board the Egg Harbor, by appellee, during the evening of April 23, about 9:30. Samples were also taken of shore tanks 8 (8 A. M. on April 24) and 62 [evening of April 23], and these samples were sent to Laucks Laboratories at once for analysis [pp. 86 and 87]. The samples from the vessel's tanks 5, 6 and 7, containing diesel, showed *merchantable* [p. 96]. The composite sample from the vessel's tanks, 2, 3 and 4, containing gasoline, showed *merchantable* [p. 96]. The sample from shore tank 8, containing diesel—taken around 8 A. M. on April 24, showed *unmerchantable* [pp. 97 and 131]. The sample from shore tank 62, containing gasoline, showed unmerchantable [p. 97].

It is to be noticed that the procedure on the discharge of gasoline was different from the diesel, in that when pumping of the gasoline alone was commenced, it was run out of each vessel's tank until it showed clear in each tank, all going into shore tank 62 [pp. 98 and 99]. Then when the gasoline was running clear, shift was made to shore tank 61 and discharge completed into shore tank 61. There was no difficulty there, all the contents being *merchantable*.

Contrast the gasoline procedure with the diesel oil—pumping of diesel alone started at 9:30 P. M. on April 23, into shore tank 8, and continued until 6 A. M. on April 24, when for some reason best known to appellee, diversion was made into shore tank 41 and continued un-

til discharge of the diesel was completed. The samples from the diesel tanks on the ship—numbers 5, 6 and 7, taken at 9:30 P. M. on April 23, showed *merchantable,* and yet the diesel was continued to be pumped into shore tank 8 for approximately 10½ hours before diverting to shore tank 41. The Laucks test showed that shore tank 8 was *unmerchantable;* apparently no samples were taken from shore tank 8 during the evening of April 23. Samples from shore tanks 41 (diesel) and 61 (gasoline) showed *merchantable,* for which appellee makes no claim.

On cross-examination, Mr. Kilbourn readily admitted that Standard Oil had sole control from the minute the diesel and gasoline went over the ship's side, and at no time informed the vessel where the products were being put. The following appears at page 108:

> "Q. By Mr. Mack: Putting it another way, Mr. Kilbourn, from the minute the gasoline and the diesel went into the discharging hose, the ship, from that time on, had nothing whatever to do with where those products went, did it? [36] A. No, that is right.
>
> Q. Now, at any time during the discharging operation, did you tell the ship or any of its crew or operators where you were putting these respective products? A. No.
>
> Q. In other words, to use a familiar phrase of the street, it was strictly your own business where you put them. Isn't that right? A. Yes."

There were 2,376 barrels of diesel in shore tank 8 before discharge commenced [p. 115] and 11,339 barrels of gasoline in shore tank 62 [p. 112]. The diesel ap-

peared to be fine [p. 116]. The gasoline was all right until 3 or 3:30 P. M., Mr. Kilbourn's testimony on the point on page 117 being as follows:

> "Q. So, up to that point at 3:00 o'clock or 3:30, your test showed the gasoline coming off the boat was all right? A. Yes. [47]"

Mr. Kilbourn received the Laucks reports on the samples submitted between 11 o'clock and 1:00 o'clock in the afternoon of April 24. Diesel was going into shore tank 41 and Mr. Kilbourn testified as follows at page 121:

> "Q. Now, when you received that report from Loucks Laboratories, did you do anything about the diesel, so far as pouring it into any other tanks is concerned? A. No. We were pumping tank 41 at that time and we just kept on pumping. We didn't change over at all.
>
> The Court: You mean after you found out that the diesel in the tanks was contaminated, you continued to pump diesel?
>
> The Witness: In tank 8, we finished pumping, and pumped tank 41 which was practically only a couple of hours pumping on 41 at the time.
>
> The Court: And you continued to pump into this same tank?
>
> The Witness: Yes. [52]"

It was further testified by Mr. Kilbourn at page 132 that diesel oil can be contaminated by a very small quantity of gasoline, whereas, on the other hand, gasoline can stand a certain amount of diesel oil. We quote his testimony on the point, for the reason that it seems impor-

tant—it would seem that more care should be exercised for a possible contamination of diesel than for gasoline. The testimony on page 132 is as follows:

"Q. Now, with respect to diesel oil, if there is gasoline in it, let us say, or it is contaminated with gasoline in any way, is there any change in the odor from it? A. Diesel oil can be contaminated by a very small quantity of gasoline and the odor would not be detected at all. You have to have a pretty sensitive nose to smell gasoline in diesel.

Q. Ordinarily doesn't diesel oil of the kind handled here have a rather flat odor? A. Diesel oil varies considerably in odor depending on the wash they put it through in the refinery. Some diesel comes through with practically no odor, and others have a very strong petroleum smell. I can't describe it, but it is very noticeable. In that case the diesel oil was very strong.

The Court: Well, I assume that a certain amount of contamination of the diesel oil with gasoline, if it was not too heavy, wouldn't hurt it any, would it?

The Witness: No. Gasoline could stand a certain amount of diesel oil.

The Court: And diesel oil could stand some gasoline?

The Witness: No, very little. You can take a tank that [66] has contained gasoline and pump it out dry and leave fumes in the tank and fill it up two-thirds or full, and there is enough gasoline vapors in there to lower the flash point four or five degrees without having any product in the tank at all. Of course, that isn't harmful because it allows a variance of 20 degrees there."

It seems clear from the facts that a lot of *good diesel* from the vessel was pumped into shore tanks 8, the tests for which, taken on the morning of April 24 after pumping into shore tank 8 had been stopped at 6 A. M., showed *unmerchantable*. We say "good diesel from the vessel" because samples taken by appellee from the ship's diesel tanks 5, 6 and 7 about *9:30 on the evening of April 23 showed merchantable*. The conclusion is apparent that from 9:30 P. M. until 6 A. M.—about 10½ hours—*good diesel* was going over the ship's side into tank 8, which later showed as *unmerchantable*. We think the conclusion further apparent that the contents of shore tank 8 must have been contaminated before 9:30 P. M. on April 23; and that, diesel oil being easily contaminated according to Mr. Kilbourn's testimony, the good diesel which went over the ship's side for 10½ hours after 9:30 P. M. on April 23 became contaminated in appellee's shore tank 8.

Now with regard to the gasoline, a different procedure was followed because the color test was reliable. When the gasoline pumped from the ship's tanks showed clear, it was then diverted into shore tank 61, and that was all good gasoline. On the other hand, 8,140 barrels of contaminated gasoline from the ship were run in with *11,339 barrels* of gasoline already in shore tank 62, making a contaminated mass of gasoline of *19,479 barrels* [p. 248].

Under the foreseeable rule of *Hadley v. Baxendale*, 9 Exch. 341, 156 English Reprint 145 (1854), appellant contends that it is improper to charge appellant with what appellee's agents did, or would do with the products in their exclusive possession and control. Appellant had no idea what Standard Oil would do with the diesel and gasoline, and was never at any time told what Standard

Oil was doing with the products once they went over the ship's side. It is also to be remembered that Paragraph 7 of the Voyage Charter Party provided in part as follows:

> "7. Pumping In and Out.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, *and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee.*" (Emphasis ours.)

It is undisputed that Standard Oil could do anything it wished with the diesel and gasoline once it went over the ship's side, and that appellant had no notice or knowledge that appellee would run the products into shore tanks already partly full.

Appellee will doubtless claim, as it did at the trial, that it is entitled to recover for the contents already in shore tanks 8 and 62 as special damages within the contemplation of the parties. 13 C. J. S. 619 dealing with Carriers states the rule as to special damages thus:

> "In an action for loss of, or injury to, goods shipped, only such damages are recoverable as were contemplated, or might reasonably have been contemplated, by the parties. To authorize a recovery of such damages as would not ordinarily flow from the loss or injury, it is essential that at the time of shipment the peculiar circumstances from which special damages would arise because of such loss or injury should be made known to the carrier; and this rule applies when it is sought to recover for loss of profits arising from the loss of the goods in transit."

Appellant never had any knowledge or notice specifically of where appellee was going to put the diesel and gasoline. Appellant could conjecture that the products would go into empty shore tanks, or into partly filled shore tanks, but it at no time knew just what was being done or where the diesel and gasoline were being placed.

In *Florida East Coast Railway Co. v. Peters,* 83 South. 559 (Fla., 1919), a shipper filed suit against the railroad company for damages because of the failure of the company to transport and deliver, within a reasonable time, large quantities of crate material designed to be used in crating tomatoes to be shipped to market. The shipper claimed loss of a part of his crop, and other damages such as keeping workmen on the payroll. The Court stated, at page 564:

> "(6-8) Assuming that the allegations as to the notice to the defendant of the special damages likely to result from the delay in transporting the crates are sufficient, the evidence does not show that the defendant had actual notice as to the special damages claimed from alleged injury to the growing tomato vines because the ripe tomatoes were not promptly picked therefrom, *and notice from common knowledge thereof cannot legally be imputed to the defendant carrier* even if such special damages are capable of reasonable accurate ascertainment. Such special damages appear to be remote or conjectural and not an ordinary result of the alleged negligence that should have been contemplated." (Emphasis ours.)

The dire consequences of charging appellant for damages to contents already in the shore tanks, if liability be

established, are readily apparent from the nature of the goods. It is entirely conceivable that 10,000 barrels of contaminated gasoline could be run in ten lots of 1,000 barrels each, into ten different shore tanks. If each of the shore tanks already had 20,000 barrels of merchantable gasoline in each of them, you would then have the situation of 10,000 barrels contaminating *200,000 barrels.* As it is, in the principal case appellee ran 8,140 barrels of contaminated gasoline into 11,339 barrels of merchantable gasoline, and makes claim for the entire 19,479 barrels. The situation could be much worse with diesel, which, according to Mr. Kilbourn, is much more easily contaminated than gasoline.

Perhaps it is a question of emphasis. It seems more reasonable that appellee should take the loss on the contents already in the shore tanks rather than appellant, when appellant had no knowledge of what was going on shore-side and appellee only was in the saddle "on the beach."

(2) Appellee Failed to Minimize Damages When Contamination of the Gasoline Was First Discovered.

Error 11 (p. 61) is as follows:

> 11. The District Court erred in not finding that libelant failed to mitigate damages by refusing all further discharge of [70] both diesel furnace oil and gasoline until appropriate laboratory tests had been made and the results known when contamination of the gasoline was first discovered by libelant about 4:30 P. M. on April 23, 1943.

It is submitted that appellee did not discharge its duty to minimize damages after the contamination of the gasoline was definitely first discovered, about 4:30 P. M. on April 23. Appellee was on notice that something was wrong. That was the time for appellee to refuse all further discharge of *at least the diesel* until appropriate laboratory tests had been made and the results known. We say "at least the diesel" for the reason that visual examination of the gasoline was satisfactory, but apparently anything but laboratory testing of the diesel was not.

Such tests as were made by appellee itself of the diesel, as distinguished from laboratory tests, at no time displayed anything wrong with the diesel, both during the period before 4:30 P. M. on April 23 and afterward during the discharge of the diesel alone, commencing about 9:30 P. M. on April 23. *In fact, appellee's own testimony shows that laboratory tests of samples of the diesel taken by Standard Oil from the vessel's tanks 5, 6 and 6 during the evening of April 23 showed that such diesel was all good.* The inference seems patent that *good* diesel was discharged from the Egg Harbor beginning at 9:30 P. M. and is strengthened by the fact that Standard Oil diverted from shore tank 8 to shore tank 41 about 6 A. M. on April 24—*and shore tank 41 was all good.*

The rule as to minimizing damages is digested at 13 C. J. S. 620, under Carriers, as follows:

> "It is the duty of the property owner to make reasonable efforts to minimize the damages, and no recovery can be had for damage which such efforts would have prevented."

In *United States v. Brookridge Farm, Inc.*, 111 F. (2d) 461 (10 C. C. A. 1940), plaintiff recovered a judgment for the breach of a contract to deliver milk to a Government hospital. The Court discussed the rule as to mitigation of damages and said, at page 465:

> "The general rule is that one who suffers injury as the result of a tort or a breach of contract, is required to exercise reasonable care and diligence to avoid the loss or to minimize the resulting damage."

We feel that there is little quarrel with the rule of mitigation of or minimizing damages. Again its application to a given set of facts is where the controversy creeps in. It is appellant's view that it was up to appellee to reasonably minimize the damages, at least on the diesel, in the manner indicated and that, accordingly, appellee is not entitled to damages, if liability be established, for the diesel put into shore tank 8 from 9:30 P. M. on April 23 until 6 A. M. on April 24.

The damages on account of the diesel and gasoline already in the shore tanks amount to $16,243.56 (page 48). The damages by reason of the diesel pumped from 9:30 P. M. on April 23 until 6 A. M. on April 24 into shore tank 8 are not in evidence, but appellant reasonably believes they can be ascertained.

D.

Damages Should Not Include Attorneys' Fees, but, If Proper, the $8,000.00 Awarded Is Excessive.

Errors 16, 17, 18 and 19 (page 62) are as follows:

> 16. The District Court erred in holding that libelant was entitled to attorney's fees in any sum or at all as damages.
>
> 17. The District Court erred in finding that if libelant were entitled to attorney's fees as damages the sum of $8,000 was reasonable or reasonably incurred for attorney's fees.
>
> 18. The District Court erred in admitting evidence relevant to attorney's fees over the objection of respondent that attorney's fees were not specifically pleaded as a portion of the damages claimed, that the question of attorney's fees as a portion of such damages had not been previously considered in the case and that attorney's fees were not a proper item of damages under the Suits in Admiralty Act.
>
> 19. The District Court erred in holding that attorney's fees [71] were recoverable or proper as damages under the Suits in Admiralty Act.

The very first time that the subject of attorneys' fees was mentioned to appellant was toward the end of the second day of trial of the case, when Mr. Hall, proctor for appellee, brought up the subject of attorneys' fees as damages under Paragraph 34 of the charter party, reading as follows:

> "34. Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder."

At that time Mr. Mack, one of the proctors for appellant, stated (page 292):

> "Mr. Mack: I wasn't aware that a claim of that kind was being made, and of course there is no specific allegation of that in the libel unless it is under the broad prayer there."

The first discussion of attorneys' fees is found at pages 291-293. On the last day of trial, February 2, 1945, Mr. Hall brought up the subject again and introduced an itemized statement of the services performed by his firm in the case. Pages 334-339 deal with what transpired, and Mr. Mack objected to any evidence relative to attorneys' fees (p. 334). Mr. Hall stated that his testimony would be that $9,000.00 would be a reasonable fee and it was stipulated that if called he would so testify (page 339).

No mention was made of attorneys' fees in the original libel (pp. 3-6) although admittedly Paragraph 2 of the prayer of the libel (p. 6) was in very broad form. Amendment to the libel specifically referring to attorneys' fees, being designated as a new Paragraph 12, was permitted by the Court to conform to proof, and a new Paragraph 4 of the prayer was similarly permitted, specifically referring to attorneys' fees—this appeared at page 42.

It will be remembered that the authority for appellee to bring this suit rests in the Suits in Admiralty Act. 46 U. S. C. A. 741-752. Section 743 provides that a decree rendered by the Court in a case under the Act may include costs and it may also include interest at 4% per annum, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based.

The allowance of costs and interest are within the discretion of the Court as in the usual admiralty case.

Nothing whatever is said about attorneys' fees in Section 743 or elsewhere in the Act. We have been unable to find any authority on the subject and can only argue that since the Act enables private parties to do something that they could not do before its enactment, *i. e.*, sue the United States in the manner provided, that the Act should be strictly construed; that when it makes no specific reference to attorneys' fees, while making provision for costs and interest at 4% per annum "or at any higher rate which shall be stipulated in any contract upon which such decree shall be based," it inferentially excludes attorneys' fees as being recoverable in suits under the Act.

Turning to the question of reasonableness of the award made, if attorneys' fees as damages are proper in the case and if appellee is entitled to recover, it is well settled that the Court is in the nature of an expert himself, having had legal training and experience, and may pass upon the reasonableness of attorneys' fees with or without the aid of testimony of witnesses as to value. In like manner, appellate courts can also pass upon the reasonable value of attorneys' services. In *Elconin v. Yalen,* 208 Cal. 546, 282 Pac. 791 (1929) the Court said, at pages 549-50 of 208 Cal:

> "The court had before it detailed evidence as to the nature and extent of the services rendered and was empowered to use his own experience and judgment as to the reasonable value thereof, with or without the aid of testimony of witnesses as to value (citing cases)."

Kirk v. Culley, 202 Cal. 501, 261 Pac. 994 (1927) states the rule, thus at page 510 of 202 Cal., relative to the power of appellate courts:

> "If the trial court may make an appraisal and adjudication of value of such services, it must be presumed that appellate courts possess like power and ability so to do."

The memorandum of services performed by appellee's proctors (pp. 336-337) shows a total of 268¼ hours time spent prior to commencement of the trial, exclusive of the time spent in telephone conversations and in the preparation of correspondence. If the round figure of 300 hours be used, it results in an award of $26.66 an hour, the trial court having awarded $8,000.00 as attorneys' fees (pp. 41 and 50).

Appellant respectfully submits that the award is excessive and should be reduced, assuming that attorneys' fees are proper as damages, and that appellee is entitled to recover. It is well known that in many instances where agencies of the United States employ special counsel, it is on the basis of $10.00 an hour for senior counsel and $7.50 per hour for junior counsel. If an award for attorneys' fees is proper, we believe the $8,000.00 should be reduced somewhere around the neighborhood of a basis of $10.00 an hour to conform to what the Government pays in many instances in employing special counsel. There is the further reason that this case may set a precedent on the point, and serious consideration should be given to the general basis upon which an award for attorneys' fees against the United States should be made.

Conclusion.

Appellant respectfully submits that the decree should be reversed for the reasons stated, primarily because the Carriage of Goods by Sea Act does not apply to the private voyage charter involved, and Paragraph 19 affords a full defense to appellant.

Respectfully submitted,

CHARLES H. CARR,
United States Attorney,

ROBERT E. WRIGHT,
Assistant United States Attorney.

LILLICK, GEARY, MCHOSE & ADAMS,
AUGUSTUS F. MACK, JR.,
Proctors for Appellant.

APPENDIX.

The following are the Charter Party and Bills of Lading which were executed and issued in connection with the carriage of the cargo involved in this suit:

Form No. 104
WARSHIPOILVOY — CONTRACT No. 268-A
6/1/42
Part I

TANKER VOYAGE CHARTER PARTY

PART I

CHARTER PARTY made as of April 14, 1943, at Philadelphia, Pa. between the UNITED STATES OF AMERICA, acting by and through the WAR SHIPPING ADMINISTRATION (hereinafter called the "Owner") of the good American SS "EGG HARBOR" (hereinafter called the "Vessel") and STANDARD OIL COMPANY OF CALIFORNIA (hereinafter called the "Charterer")

This Charter Party consists of this Part I and Part II on the reverse hereof. Unless in this Part I otherwise provided, all of the provisions of Part II shall be part of this Charter Party as though fully incorporated herein.

Net Registered Tonnage of Vessel: 6,126 Classed: AI American Bureau of Shipping

Loaded Draft of Vessel Applicable for this Voyage, 30 ft. 9½ in. in salt water.

Capacity of: 135,000 bbls. (of 42 American measured gallons at 60° F. each)
~~or tons of 2240 lbs~~ of Gasoline or Diesel Oil
(10% more or less, vessel's option.)

Now:..... Coiled: in all main tanks

Loading Port: San Pedro and/or El Segundo, California

Cargo: Gasoline and/or Diesel Oil
Discharging Port: safe U. S. Pacific Northwest
Freight Rate: W. S. A. Rate applicable
Payable at: Philadelphia, Pa.
Readiness Date: April 12, 1943
Cancelling Date: May 12, 1943
Hours for Loading & Discharging: 96
Demurrage per hour: $135.00

Last 2 cargoes:.....

Special Provisions:

1. This Charter Party cancels and supersedes Charter Party dated April 5, 1943, Contract No. 268.

OK
HHF

In Witness Whereof the parties hereto have executed this agreement, in triplicate, as of the day and year first above written.

Witness the signature of:
Walter E. Rex
J. W. Foy

United States of America
By: War Shipping Aministration
By: Keystone Shipping Co., Agent
By: Walter E .Rex
Walter E. Rex, Secretary

H. H. Flynn

Standard Oil Company of California
J. L. Hanna
Vice President

Witness the signature of:
J. L. Hanna

[The following clause is rubber-stamped on the face of the document]:

"This document contains information affecting the national defense of the United States within the meaning of Espionage Act, 50 U. S. C., 31 and 32 as amended. Its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law."

Form No. 104
WARSHIPOILVOY
6/1/42
Part II

TANKER VOYAGE CHARTER PARTY
PART II

LOADING PORT
WARRANTY
CARGO
DISCHARGING PORT
FREIGHT RATE
INSPECTOR'S CERTIFICATE

1(a).—The Vessel, classed as aforesaid and to be so maintained during the currency of this Charter, shall, with all convenient dispatch, proceed as ordered to Loading Port or so near thereunto as she may safely get (always afloat), and being tight, staunch and strong, and having all pipes, pumps and heater coils in good working order, and being in every respect fitted for the voyage, so far as the foregoing conditions can be attained by the exercise of due diligence, perils of the sea and any other cause of whatsoever kind beyond the Owner's control excepted, shall load (always afloat) from the factors of the Char-

terer a full and complete cargo of Petroleum and/or its products in bulk, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, stores and furniture (sufficient space to be left in the expansion tanks to provide for the expansion of the cargo), and being so loaded shall forthwith proceed, as ordered on signing Bills of Lading, to Discharging Port, or so near thereunto as she may safely get (always afloat), and deliver said cargo. The freight shall be at and after the rate stipulated in Part I hereof, based on intake quantity as shown on the Inspector's Certificate of Inspection, the services of the Petroleum Inspector to be arranged and paid for by the Charterer who shall furnish the Owner's Agent with a copy of the Inspector's Certificate. No deduction of freight shall be made for water and/or sediment contained in the Oil.

1(b). Freight Payable.—Full freight shall be irrevocably earned on cargo as loaded, vessel and/or cargo lost or not lost; payment to be made in United States Dollars to Owner's Agent at the Agent's place of business upon receipt by the Agent of figures indicating quantity of cargo loaded as provided in 1(a) above. On completion of loading, Owner will order vessel to sail to discharging port, Charterer nevertheless remaining liable to the Owner for all freight and charges, vessel and/or cargo lost or not lost.

1(c). Advances.—Cash shall be advanced by Charterer to the Master or Owner's Agents, if required, for ordinary disbursements at ports of loading and/or discharge at current rates of exchange.

2. Time for Naming Loading Port.—The Charterer shall name the loading port twenty-four (24) hours prior

to the Vessel's readiness to sail from the last previous port of discharge, or from her bunkering port for the voyage, or upon signing this Charter if the Vessel has already sailed. Any extra expenses incurred by reason of the Charterer's delay in furnishing loading port orders shall be paid for by the Charterer, and any time thereby lost to the Vessel shall count as used lay time.

3. Readiness and Cancelling Date.—Lay time shall not commence before the readiness date stipulated in Part I hereof, except with the Charterer's sanction, and should the Vessel not be ready to load by 4:00 o'clock P. M. (local time) on the cancelling date stipulated in Part I hereof, the Charterer shall have the option of cancelling this Charter by giving Owner notice of such cancellation within twenty-four (24) hours after such cancellation date; otherwise this Charter to remain in full force and effect.

4. Notice of Readiness.—The Master or his representative shall give the Charterer or his agent at the ports of loading and discharge notice in writing during ordinary business hours that the Vessel is ready to load or discharge cargo, berth or no berth, and lay time shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the Vessel's arrival in berth (i. e., finished mooring when at a sealoading or discharging terminal, and all fast when loading or discharging alongside a wharf), whichever first occurs; provided, however, that where, because of routing instructions or other orders of the Owner over which the Charterer has no control, delay is caused to the Vessel for more than six (6) hours after notice of readiness is given, in waiting turn to load or discharge, lay time shall not commence until Vessel is berthed.

5. Hours for Loading and Discharge.—Such number of running hours as are stipulated in Part I hereof shall be allowed the Charterer as lay time for loading and discharging cargo; but if the Vessel's condition or facilities do not admit of loading and discharging in the time allowed, then the additional time necessary therefor shall be included in lay time. If regulations of the owner or port authorities prohibit loading or discharging of the cargo at night, time so lost shall not count as used lay time; if the Charterer, Shipper or Consignee prohibits loading or discharging at night, time so lost shall count as used lay time.

6(a). Safe Berth.—The Vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and secured by the Charterer, any lighterage being at the expense, risk and peril of the Charterer, provided that the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat. The Charterer shall have the right of shifting the Vessel at ports of loading and/or discharge from one safe berth to another on payment of all expenses incurred, except as stated in Clause 14 hereof. Time consumed on account of shifting shall count as used lay time, except as stated in Clause 14.

6(b). Flashpoint.—No petroleum or its products having a flashpoint under 150° Fahrenheit (Closed Cup Abel Test) shall be loaded from lighters but this clause shall not restrict the Charterer from loading or topping off crude oil from vessels or barges inside or outside the bar at any port or place where bar conditions exist.

7. Pumping in and Out.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense

of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee. The Vessel shall supply her pumps and the necessary steam for discharging in all ports where the regulations permit of fire on board, as well as necessary hands. Should regulations not permit fires on board, the Charterer or Consignee shall supply, at its expense, all steam necessary for discharging as well as loading, but the Owner shall pay for steam supplied to the Vessel for all other purposes. If cargo is loaded from lighters, the Vessel, if permitted to have fires on board, shall, if required, furnish steam to lighters at Charterer's expense for pumping cargo into the Vessel.

8. Hoses.—Hoses for loading and discharging to be furnished by Charterer at its risk and expense.

9. Deadfreight.—Should the Charterer fail to supply a full cargo, the Vessel may, at the Master's option, and shall, upon request of the Charterer, proceed on her voyage, provided that the tanks in which cargo is loaded are sufficiently filled to put her in seaworthy condition. In that event, however, dead freight shall be paid on the difference between the quantity loaded and the quantity the Vessel would have carried if loaded to her minimum permissible freeboard for the voyage.

10. Demurrage.—Charterer shall pay demurrage per running hour and prorata for a part thereof at the rate stipulated in Part I for all time that loading and discharging and used lay time as elsewhere herein provided exceeds the allowed lay time herein specified. If, however, demurrage shall be incurred at ports of loading and/or discharge because of fire or explosion in or about the plant, or be-

cause of breakdown of machinery, of the Charterer, shipper, or consignee of the cargo, the rate of demurrage shall be reduced to one-half the rate stipulated in Part I hereof per running hour and prorata of such reduced rate for part of an hour for demurrage so incurred.

11. Dues, Wharfage.—Dues and other charges on the cargo shall be paid by the Charterer, and dues and other charges on the Vessel shall be paid by the Owner. The Vessel, however, shall always be free of wharfage, dockage, and quay dues.

12. Previous Cargo.—The last two successive cargoes carried, or to be carried, by the Vessel immediately preceding her entering upon this Charter consisted, or will consist, of cargoes as stipulated in Part I hereof.

13. Products Excluded.—No product shall be shipped which fails to meet one or the other of the two following requirements: (1) The vapor pressure at one hundred degrees Fahrenheit (100° F.) shall not exceed thirteen pounds (13 lbs.) as determined by the A. S. T. M. Method (Reid Method) identified as D-323 current at the time shipment is made. (2) The distillation loss shall not exceed four per cent (4%) and the sum of the distillation loss and the distillate collected in the receiving graduate shall not exceed ten per cent (10%) when the thermometer reads one hundred twenty-two degrees Fahrenheit (122° F.). Note—The distillation test shall be made by A. S. T. M. Method identified as D-86 current at the time shipment is made. When products other than Naphtha or Gasoline are tested, the distillation loss may be determined by distilling not less than twenty-five per cent (25%) and deducting from one hundred per cent (100%) the sum of the volumes of the distillate and the residue in the flask

(cooled to a temperature of sixty degrees Fahrenheit (60° F.).)

14. Two Ports Counting as One.—The following two ports, viz., Paulsboro (New Jersey), and Marcus Hook (Pennsylvania), Paulsboro (New Jersey), and Wilmington (Delaware), Beaumont and Sabine (Texas), Baytown and Texas City (Texas), Ingleside and Harbor Island (Texas), and Baton Rouge (Louisiana) and a safe port on the Mississippi River below Baton Rouge, respectively, shall count as one port, and all expenses incurred in shifting from Paulsboro to Marcus Hook, Paulsboro (New Jersey) to Wilmington (Delaware), or vice versa, or from Beaumont to Sabine, or from Baytown to Texas City, or from Ingleside to Harbor Island, or from Baton Rouge to a safe port on the Mississippi River below Baton Rouge or vice versa, shall be for account of the Owner, except that any extra port charges incurred by reason of calling at the second port in each group shall be for account of the Charterer. Time consumed in shifting shall not count as used lay time.

15. Ice.—In case port of loading or discharge shall be inaccessible owing to ice, the Vessel shall direct her course according to Master's judgment, notifying by telegraph or radio, if available, the Charterer, Shipper or Consignee, who is bound to telegraph or radio orders for another port (at its option), which is free from ice, and where there are facilities for the loading or reception of Petroleum in bulk. The whole of the time occupied from the time the Vessel is diverted by reason of ice until her arrival at an ice-free port of loading or discharge as the case may be shall be paid for by the Charterer at the rate stipulated in Part I hereof.

16.—If on Vessel's arrival off the port of loading or discharge there is danger of the Vessel being frozen in, the Master shall communicate by telegraph or radio, if available, with the Charterer, Shipper or Consignee of the cargo, who shall telegraph or radio him in reply, giving orders to proceed to another port as per Clause 15, where there is no danger of ice and where there are the necessary facilities for the loading or reception of Petroleum in bulk, or to remain at the orignal port at their risk, and in either case Charterer to pay for the time that the Vessel may be delayed, at the rate stipulated in Part I hereof.

17. QUARANTINE.—Should the Charterer send the Vessel to any port or place where a quarantine exists, any delay thereby caused to the Vessel shall count as used lay time; but should the quarantine not be declared until the Vessel is on passage to such port, the Charterer shall not be liable for any resulting delay.

18.—If the Vessel, prior to or after entering upon this Charter, has docked or docks at any wharf which is not rat-free or stegomyia-free, she shall, before proceeding to a rat-free or stegomyia-free wharf, be fumigated by the Owner at his expense, except that if the Charterer ordered the Vessel to the infected wharf he shall bear the expense of fumigation.

19. CLEANING.—If requested by the Charterer, the Vessel will steam the tanks, pipes and pumps of the Vessel or Butterworth en route to loading port and there pump water ballast and/or slops into shore tank or barge to be supplied by Charterer immediately on arrival. Any delay in furnishing these facilities shall count as used lay time. Any further cleaning, if required, shall be done by and at the expense of Charterer and time consumed shall count

as used lay time. If Charterer does not require additional cleaning at port of loading Owner shall not be responsible for any damage caused to or contamination of cargo, by reason of failure to have the tanks properly cleaned for receiving the shipment. Except as may otherwise be indicated in Part I, the Vessel shall not be responsible for leakage, shrinkage, difference between reported intake and reported outturn, deterioration, discoloration, or change in quality of the cargo, nor for any consequences arising out of shipping more than one grade of cargo.

20(a). Act of God, etc.—The Vessel, her Master and Owner shall not, unless otherwise in this Charter expressly provided, be responsible for any loss or damage, or delay or failure in performing hereunder, arising or resulting from:—any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless caused by the personal design or neglect of the Owner; collision, stranding, or peril, danger or accident of the sea or other navigable waters; saving or attempting to save life or property; wastage in weight or bulk, or any other loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer or Owner, Shipper or Consignee of the cargo, their agents or representatives; insufficiency of packing; insufficiency or inadequacy of marks; explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery; unseaworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped and supplied; or from

any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from:—Act of God; act of war; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion.

20(b). WATER BALLAST.—Charges for handling, storing or disposing of water ballast at loading port to be for account of Charterer.

20(c). TAXES.—Any Habilitacion tax, customs overtime, and taxes on freight at loading or discharging ports, also any unusual taxes, assessments and governmental charges that are not presently in effect but in the future may be imposed on the vessel or freight are to be borne by Charterer.

21. JASON CLAUSE.—In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Owner is not responsible by statute, contract, or otherwise, the cargo, shippers, consignees, or owners of the cargo shall contribute with the Owner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo. If a salving ship is

owned or operated by the Owner, salvage shall be paid for as fully as if the salving ship or ships belong to strangers.

22. General Average.—General average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the Owner, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the Owner, must be furnished before delivery of the cargo. Such cash deposit as the Owner or his agents may deem sufficient as additional security for the contribution of the cargo and for any salvage and special charges thereon, shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the Owner before delivery. Such deposit shall, at the option of the Owner, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money.

23. Deviation.—The Vessel shall have liberty to call at any ports in any order, to sail with or without pilots,

to tow or to be towed, to go to the assistance of vessels in distress, to deviate for the purpose of saving life or property or of landing any ill or injured person on board, and to call for fuel at any port or ports in or out of the regular course of the voyage. Any salvage shall be for the sole benefit of the Owner.

24. Bills of Lading.—Bills of Lading, in the form appearing below, for cargo shipped shall be signed by the Master as requested. Any Bill of Lading signed by the Master or Agent of the Owner shall be without prejudice to the terms, conditions and exceptions of this Charter. The Charterer hereby agrees to indemnify and hold harmless the Owner, the Master, and the Vessel from all consequences or liabilities that may arise from the Charterer or its agents, or the Master, signing bills of lading or other documents inconsistent with this Charter, or from any irregularity in papers supplied by the Charterer or its agents, or from complying with its or its agents' orders.

25. Clause Paramount.—All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further.

26. Both to Blame.—If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master,

mariner, pilot or the servants of the Owner in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non-carrying ship or her Owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying ship or her Owners to the owners of said cargo and set off, recouped or recovered by the other or non-carrying ship or her Owners as part of their claim against the carrying ship or Owner. The foregoing provisions shall also apply where the Owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

27. LIEN.—The Owner shall have an absolute lien on the cargo for all freight, dead freight, demurrage and costs, including attorney's fees, of recovering the same, which lien shall continue after delivery of the cargo into the possession of the Charterer, or of the holders of any Bills of Lading covering the same, or of any storageman.

28. AGENTS.—The Owner shall appoint Vessel's agents at all ports.

29(a). WAR CLAUSE.—In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Owner or Master is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to or loss of the Vessel or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the cargo at the port of

discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, the Owner may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the cargo at port of shipment and upon their failure to do so, may warehouse the cargo at the risk and expense of the cargo; or the Owner or Master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the cargo there, may discharge the cargo into depot, lazaretto, craft or other place; or the Vessel may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the Master or the Owner may consider safe or advisable under the circumstances, and discharge the cargo, or any part thereof, at any such port or place; or the Owner or the Master may retain the cargo on board until the return trip or until such time as the Owner or the Master thinks advisable and discharge the cargo at any place whatsoever as herein provided or the Owner or the Master may discharge and forward the cargo by any means at the risk and expense of the cargo. The Owner or the Master is not required to give notice of discharge of the cargo, or the forwarding thereof as herein provided. When the cargo is discharged from the Vessel, as herein provided, it shall be at its own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Owner shall be freed from any further responsibility. For any service rendered to the cargo as herein provided the owner shall be entitled to a reasonable extra compensation.

29(b).—The Owner, Master and Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the Vessel, the right to give such orders or directions. Delivery or other disposition of the cargo in accordance with such orders or directions shall be a fulfillment of the contract voyage. The Vessel may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy.

29(c).—In addition to all other liberties herein the Owner shall have the right to withhold delivery of, reship to, deposit or discharge the cargo at any place whatsoever, surrender or dispose of the cargo in accordance with any direction, condition or agreement imposed upon or exacted from the Owner by any government or department thereof or any person purporting to act with the authority of either of them. In any of the above circumstances the cargo shall be solely at their risk and expense and all expenses and charges so incurred shall be payable by the owner or consignee thereof and shall be a lien on the cargo.

30. Priority.—All agreements of the Owner contained in this Charter Party shall be subject to any orders or instructions of priority or requisition issued by the United States Government or the Government of the flag of the Vessel or any agencies thereof, or the requirement of naval or military authorities or other Agencies of Government.

31. Limitation of Liability.—Any provision of this Charter to the contrary notwithstanding, the Owner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owner or Chartered Owner of vessels by any statute or rule of law for the time being in force.

32. Approval.—The voyage under this Charter is subject to the approval of the War Shipping Administration and any conditions imposed by said Administration pursuant to the Ship Warrants Act (Public Law 173, 77th Congress).

33. Assignment.—Subject to the approval of War Shipping Administration, the Charterer shall have the option of subletting or assigning this Charter to any individual or company, but the Charterer shall always remain responsible for the due fulfillment of this Charter in all its terms and conditions.

34. Breach.—Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder.

35. Members of Congress.—No member of or delegate to the Congress, nor Resident Commissioner, shall be admitted to any share or part of this Charter or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909.

36. Definition of "Owner."—Wherever the word "Owner" appears herein same shall be deemed to include a Time Charterer, Demise Charterer, or a Requisition Charterer or user.

37.—This Charter Party consists of this Part II and of Part I on the reverse hereof. Unless in this Part II

otherwise provided, all of the provisions of said Part I shall be part of this Charter Party as though fully incorporated herein. In the event of conflict between the provisions of this Part II and those of Part I, the provisions of Part I shall govern to the extent of such conflict.

BILL OF LADING.

Shipped in apparent good order and condition by.....
on board the .....
Motorship
Steamship .....
whereof .....is Master,
at the port of.....
to be delivered at the port of.....
or so near thereto as the Vessel can safely get, always afloat, unto .....
or order on payment of freight at the rate of.....
This shipment is carried under and pursuant to the terms of the Charter dated .....
at..... between.....
and.....as Charterer, and all the terms whatsoever of the said Charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment.

In Witness Whereof, the Master has signed.....
.....Bills of Lading of this tenor and date, one of which being accompklished, the others will be void.

Dated at..... this.....
day of.....

.....
Master

Bill of Lading No.....

Shipped in apparent good order and condition by Standard Oil Company of California on Board the American Steamship "Egg Harbor" whether L. C. Olsen is master, at the port of Los Angeles, California.

Part Cargo "Standard Diesel Furnace Oil" in bulk;

60,933.31 Net Barrels 60° F.
8,224.23 Long Tons
API Gravity 32.2.

to be delivered at the Port of....., or so near thereto as the vessel can safely get, always afloat, unto .....pursuant to terms of contract/charter dated As Agreed

in witness whereof the master has signed One (1) bills of lading of this tenor and date, one of which being accomplished, the others will be void.

Dated at San Pedro, California this 17th day of April, 1943.

L. C. Olsen
Master.

[The following clauses are rubber-stamped on the face of the document]:

This document contains information affecting the national defense of the United States within the meaning of the Espionage Act, 50 U. S. C., 31 and 32 as amended. Its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law.

This bill of lading shall have effect subject to the provisions of the carriage of goods by Sea Act of the United States, Approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its Rights or Immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

Bill of Lading No.....

Shipped in apparent good order and condition by Standard Motorship Oil Co. of California on board the American Steamship "Egg Harbor" whereof L. C. Olsen is master, at the Port of El Segundo, California.

Part Cargo Standard Gasoline (Summer Grade) in Bulk:

63,789.52 Gross 42 Gallon Barrels at 60° F.
7,353.34 Long Tons
60.1 A. P. I. Gravity

to be delivered at the Port of....., or so near thereto as the vessel can safely get, always afloat, unto .....pursuant to terms of contract/charter dated as agreed

in witness whereof the master has signed One (1) bills of lading of this tenor and date, one of which being accomplished, the others will be void.

Dated at El Segundo, California this 18th day of April, 1943.

L. C. Olsen
Master

[The following clause is rubber-stamped on the face of the document]:

This bill of lading shall have effect subject to the provisions of the carriage of goods by Sea Act of the United States, Approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its Rights or Immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.